IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 75 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

and

Hon'ble MISS JUSTICE R.M.DOSHIT

and

Hon'ble MR.JUSTICE R.P.DHOLAKIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : YES

PATEL DINNESHKUMAR SHIVRAM SOMDAS

Versus

PATEL KESHAVLAL MOHANLAL

Appearance:

MR KN PANDYA for Petitioner

MR CL SONI for Respondent No. 1

MR KC SHAH, APP for Respondent No. 2

CORAM : MR.JUSTICE M.S.PARIKH

and

MISS JUSTICE R.M.DOSHIT

and

MR.JUSTICE R.P.DHOLAKIA

Date of decision: 31/03/2000

ORAL JUDGEMENT [Per M.S. Parikh, J.]

1. By judgment and order dated 9/12/1998 learned Single Judge (Coram : H.R. Shelat, J.) proposed Reference in following terms to a Larger Bench :-

"From what day the period of 15 days envisaged by Sec. 138(c) of Negotiable Instruments Act, 1881 begins to run, whether on and from the date of the service of the notice is effected or excluding the day on which the service of notice is effected ?"

That is how the present Reference is before this Court in the context of following brief facts :-

2. The appellant (the complainant) came in contact with 1st respondent (the accused) since they were hailing from the same community. The 1st respondent had a talk about the job, the appellant was seeking for. At that time the 1st respondent was in need of money. Initially Rs.15,000/- came to be advanced on 18/5/1989. Rs.20,000/- were again paid on 25/5/1989 and since he was in need of money Rs.35,000/- were again advanced to him on 25/7/1989. He did not return the amount back as promised to the appellant. He, therefore, demanded the amount from the 1st respondent. It is in this background that the respondent no. 1 issued a cheque for Rs.70,000/- drawn on Bank of Baroda, Odhav Branch, Ahmedabad on 21/10/1992. The appellant presented it in Mehsana Urban Cooperative Bank Ltd., Mehsana. The same, however, returned dishonoured. The appellant was intimated about the same. Respondent no. 1 was then informed about the dishonour of the cheque and he assured to make payment thereof any how. Subsequently at the request of the 1st respondent the cheque was presented again in the Mehsana Urban Cooperative Bank Ltd at Mehsana. It was not honoured because of insufficient funs in the account of the 1st respondent. The bank received the cheque back on 21/1/1993 and intimation thereof was given to the appellant on 29/1/1993. The appellant then issued a notice on 6/2/1993 by Regd. post. It was received back with endorsement "refused". After such service of notice the respondent no. 1 made

no payment. The appellant could see that the respondent no. 1 committed offence punishable u/S. 138 of the Negotiable Instruments Act, 1881 (for short 'the Act'). Taking legal advice, the appellant filed complaint in the Court of the Ld. Chief Judicial Magistrate, Mehsana and the same was registered as Criminal Case No. 834 of 1993. The 1st respondent pleaded not guilty to the charge and claimed to be tried. Upon appreciation of evidence before him, the Ld. Chief Judicial Magistrate held that no cause of action had arisen for initiating criminal action in as much as the complaint being premature was liable to be dismissed and the 1st respondent was required to be acquitted. Hence, he rendered acquittal on 8/2/1996. That order of acquittal became the subject matter of the present appeal before the Ld. Single Judge.

3. The question that arose before the Ld. Single Judge was thus in the context of the relevant dates about the receipt of notice and filing of complaint. To recall, the notice as contemplated u/S. 138 (c) of the Act was issued on 6/2/1993. It was served on the 1st respondent as aforesaid on 9/2/1993. As no payment was made on or before 24/2/1993 the appellant filed the complaint alleging offences punishable u/S. 138 of the Act against the 1st respondent on 24/2/1993 itself. That is how the complaint was held to be premature because the cause of action had not arisen on that day. Question that was agitated before the Ld. Single Judge was whether the concept of exclusion of one day would apply in computing period of 15 days as contemplated by clause (c) to section 138 of the Act. On behalf of the appellant reference was made to decisions in the case of Smt. Aruna Bai V/s. Surendra Babu reported in 1995 (4) CRIMES 538. There, after the cheque was dishonoured notice was issued on 24/4/1992 which was served on 25/4/1992. It was held that the complaint was filed within the period of limitation as 15 days period after receipt of notice would end on 9/5/1992. It was so held by the Karnataka High Court because while computing the period of 15 days the day on which notice was served was not to be excluded. Another decision that was canvassed on behalf of the appellant was in the case of Pradip Tibrewala Vs. State of Gujarat and another reported in 1998 Criminal Law Journal 559. A Ld. Single Judge of this Court also held that the complaint in that case was not premature because the date on which the notice was served was not required to be excluded and the period of 15 days as contemplated by clause (c) to section 138 of the Act would have to be reckoned by including the day on which the notice was received. The Ld. Single Judge

referring the matter as aforesaid did not agree with this view expressed by the Karnataka High Court and this Court. He accepted the proposition that in computing the period in clause (c) to section 138 of the Act the day on which the notice was served i.e. received should be excluded. Reference in this connection was made to the following decisions :-

(1) Shri Venu V/s. Sri Krishnappa reported in 1992 (2) CRIMES 42
(2) Mr. Poornasree Agencies Vs. M/s. Universal Enterprises and anor., reported in 1995 Criminal Law Lournal, 1858
(3) Ghanshyam M. Swami Vs. M/s. Classic Steel Products and ors. reported in 1991 (2) G.L.H. 121
(4) Brijmohandas and anr. V/s. Punjab National Bank and anr. reported in AIR 1982 NOC 65 (M.P.)
(5) Sureshchandra and ors. V/s. Birdichand and ors. reported in AIR 1965 Rajasthan 229,
(6) Rajibhai T. Choitani V/s. State of Gujarat, reported in 1990 (2) G.L.H. 230,
(7) Haru Das Gupta V/s. The State of West Bengal reported in AIR 1972 S.C. 1293,
(8) N. Venkata Sivaram Prasad V/s. M/s. Rajeswari Constructions reported in 1996 CRI.L.J. 3409
(9) Rakesh Nemkumar Porwal V/s. Narayan Dhondu Joglekar and anr. reported in 1993 CRI.L.J. 680
(10) Ashok Hegde V/s. Jathin V. Attawan reported in 1997 CRI.L.J. 3691
(11) Jadav Chandra Banik V/s. Jogesh Chandra Sukla Das reported in AIR 1970 Tripura, 71,
(12) Padma Charan Mohapatra V/s. Superintendent of Police Cum Taxing Authority of Phulbani reported in AIR 1965 Orissa 71,
(13) Ram Chandra Govind Unnave V/s. Laxman Savleram Roughe reported in AIR 1938 Bombay 447 : 40 Bom. L.R. 892,
(14) E.P.Janu Amma (Smt.) V/s. Revenue Divisional Officer, Kozhikode reported in AIR 1980 Kerala 175,

Taking the guide from the above decisions, more particularly the decision of the Karnataka High Court in the case of Ashok Hegde V/s. Jathin V. Attawan reported in 1997 CRI.L.J. 3691 the Ld. Single Judge expressed his view that principle of exclusion of one day would also apply while interpreting clause (c) to section 138 of the Act.

4. It is in the aforesaid background that the present Reference has been heard today.

5. The facts as aforesaid are not in dispute. If the principle of exclusion is applied as aforesaid, the decision of the Ld. Chief Judicial Magistrate would hold good and the Reference has to be accepted. However, Mr. K.M. Pandya, Ld. Advocate for the appellant made reference to a decision of the Hon'ble Supreme Court in the case of M/s. SIL Import, USA V/s. M/s. Exim Aides Silk Exporters, Bangalore reported in 1999 CRI.L.J. 2276. In that case certain cheques were issued by the appellant in favour of the respondent and they returned dishonoured on presentation. On receipt of such intimation of dishonour the respondent sent notice by fax on 11/6/1996. On the next day the respondent sent the same notice by Regd. Post served on the appellant on 25/6/1996. On 8/8/1996 the respondent filed complaint. The question was whether the complaint was within the period of 30 days from the date of accrual of cause of action. It was pleaded by the appellant being the drawer of the cheque that cause of action accrued on the expiry of 15 days from 11/6/1996, the date on which the fax notice was sent to the appellant, receipt of which was owned by the appellant. The respondent on the other hand contended that 15 days could be counted only from 25/6/1996 when the appellant drawer of the cheque received the notice sent by Regd. Post and the cause of action would have arisen only on 11/7/1996. The complaint which was filed on 8/8/1996 was, therefore, within time. The High Court took the view that the cause of action would arise only on the expiry of 15 days from the date which the complainant knew to be the date of service of notice and held that the complaint was within time. In the background of such facts it was held by the Apex Court that on the date when the notice sent by fax reached the drawer of the cheque, the period of 15 days (within which he is to make the payment) started running and on the expiry of that period, the offence would stand completed unless the amount had been paid in the meanwhile. If no complaint was filed within one month therefrom the payee was forbidden from launching a prosecution thereafter, due to the clear interdict contained in section 142 of the Act. On going through the whole of this decision, it would clearly appear that what the Apex Court has laid down is that the period as contemplated by clause (c) of the proviso to section 138 of the Act should be referred to the first notice sent by fax and not as contended to the second notice sent by Regd. Post. It was also held that the view that the sender of the notice must know the date when it was received by the sendee for otherwise, he would not be in a position to count the period in order to ascertain the

date when cause of action has arisen was not accepted to be correct view, since it would amount to erase the starting date of the period of 15 days as envisaged in clause (c) to section 138 of the Act. It might, therefore, be seen that the decision does not deal with the manner of computation of period of 15 days under clause (c) to section 138 of the Act. Mr. Pandya also relied upon other two decisions with which the Ld. Single Judge did not agree. He canvassed the said decisions submitting that plain reading of the clause (c) to section 138 of the Act would not call for the application of principle of exclusion of one day i.e. the day on which the notice was received by the drawer of the cheque. He tried to make good his submission by making reference to proposition "within" used in the clause. Attractive as it sounds, the argument will be of no consequence, in view of the latest decision of the Apex Court on the question of manner of computation of period in both the aforesaid clauses, namely clause (c) to section 138 of the Act as well as clause (b) to section 142 of the Act. Both the sections with respective clauses would read as under :-

"138. Dishonour of cheque for insufficiency, etc. of funds in the accounts

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both :

PROVIDED that nothing contained in this section shall apply unless -

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier,

(b) the payee or the holder induce course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer, of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

142. Cognisance of offences

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)

(a) no court shall take cognisance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque

(b) such complaint is made within one month of the date on which the cause-of-action arises under clause (c) of the proviso to section 138;

(c) no court inferior to that of Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138."

6. In Saketh India Ltd. v/s. India Securities Ltd. reported in (1999) 3 S.C.C. 1 the very question clearly appears to have been considered by the Apex Court. In that case cheques dated 15/3/1995 and 16/3/1995 issued by the appellant bounced when presented for encashment. Notices were served on the accused on 29/9/1995. As per section 138 (c) the accused were required to make payment of the said amount of money within 15 days. The accused failed to pay the said amount. Hence, the cause of action for filing complaint arose from 15/10/1995, but the complaints were filedon 15/11/1995. Therefore, it was contended that the complaints were filed beyond time. The accused approached the High Court u/S. 482 of the Criminal Procedure Code (Cr.P.C.) for quashing and setting aside the process issued by the Learned 11th Addl. Chief Metropolitan Magistrate, Bangalore. Petitions came to be rejected by the High Court. In

appeals the question with regard to computation of period arose before the Apex Court. After quoting the provisions of sections 138 and 142 of the Act and referring to the case of Haru Das Gupta v/s. State of W.B. reported in (1972) 1 S.C.C.639 : 1972 S.C.C. (Cri.) 368 the Apex Court has held as under :-

"7. The aforesaid principle of excluding the day from which the period is to be reckoned is incorporated in Section 12(1) and (2) of the Limitation Act, 1963. Section 12(1) specifically provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. Similar provision is made in sub-section (2) for appeal, revision or review. The same principle is also incorporated in Section 9 of the General Clauses Act, 1897 which, inter alia, provides that in any Central Act made after the commencement of the General Clauses Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and for the purpose of including the last in a series of days or any other period of time, to use the word "to".

8. Hence, there is no reason for not adopting the rule enunciated in the aforesaid case which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act. Ordinarily in computing the time, the rule observed is to exclude the first day and to include the last. Applying the said rule, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer expires. The period of 15 days in the present case expired on 14/10/1995. So cause of action for filing complaint would arise from 15/10/1995. That day (15th October) is to be excluded for counting the period of one month. Complaint is filed on 15/11/1995. The result would be that the complaint filed on 15th November is within time."

It may be noted from what is ruled by the Apex Court that in the process of computation of period referable to clause (c) to section 138 , the first day of service of notice i.e. 29/9/1995 has been excluded. The period of

15 days clearly appears to have been counted accordingly as expiring on 14/10/1995. That is how it has been held that the cause of action for filing complaint would arise on 15/10/1995. Once again for the purpose of computation of period of one month under clause (b) to section 142, 15/10/1995 has been excluded on the principle of exclusion. In this manner of computation of period complaint filed on 15/11/1995 has been held to be within time. In our considered opinion, the question of computation so resolved by the Apex Court squarely answers the question which has been referred to this Bench.

7. In above view of the matter, the question which has been referred to this Bench will stand answered as under :-

The period of 15 days envisaged by section 138 (c) of the Negotiable Instruments Act, 1881 will begin to run on the day next to the day on which the service of notice has been effected.

8. In view of above answer to the question nothing will survive in the appeal and instead of remanding the same back to the Ld. Single Judge, the same is required to be disposed of as dismissed. Order accordingly.

* * *

PVR